

## REMARKS

### **1. Summary of the Office Action**

In the final Office Action mailed on July 27, 2009, the Examiner provisionally rejected claims 1-21 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of U.S. Patent Application No. 10/830,575 ("the '575 Application") and over claims 1-20 of U.S. Patent App. No. 10/861,065 ("the '065 Application").

### **2. Summary of the Response**

In this response, Applicant has amended claims 1-3, 7, 10, 12, and 14-21 merely to correct minor errors and clarify the language of these claims. As such, the claim amendments herein are non-narrowing amendments which do not require an additional search by the Examiner and are supported by the specification. Therefore, Applicant respectfully requests that the Examiner enter these amendments after a final rejection.

Now pending are claims 1-21, of which claims 1, 8, 15, and 20 are independent claims.

### **3. Response to the Rejections of Claims 1-21 on the Ground of Nonstatutory Obviousness-Type Double Patenting**

As mentioned above, the Examiner provisionally rejected claims 1-21 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of the '575 Application and over claims 1-20 of the '065 Application.

**a. The Examiner is requested to withdraw the provisional nonstatutory obviousness-type double patenting rejection in accordance with M.P.E.P. § 804(I)(B)(1).**

With respect to nonstatutory obviousness-type double patenting rejections, the M.P.E.P. instructs the Examination Corps as follows:

**If a "provisional" nonstatutory obviousness-type double patenting (ODP) rejection is the only rejection remaining in the earlier filed of the two pending applications, while the later-filed application is rejectable on other grounds, the examiner should withdraw that rejection and permit the earlier-filed application to issue as a patent without a terminal disclaimer.**

M.P.E.P. § 804(I)(B)(1) (emphasis added).

Applicant respectfully reminds the Examiner that there are only nonstatutory obviousness-type double patenting rejections outstanding against the current application. Additionally, the filing date for the instant application is October 8, 2003, which is earlier than both the April 23, 2004 filing date of the '575 Application and the June 4, 2004 filing date of the '065 Application.

As there are only nonstatutory obviousness-type double patenting rejections outstanding, the Examiner is requested to withdraw the provisional double-patenting rejections, as required under M.P.E.P. § 804(I)(B)(1) to permit the earlier-filed instant application to issue as a patent without a terminal disclaimer.

**b. Double patenting rejections over the claims of the '575 Application are improper, as the '575 Application is abandoned and therefore no longer pending.**

Applicant submits that '575 Application is abandoned and therefore is not a pending application. Applicant has included a copy of the Notice of Abandonment for the '575 Application mailed on February 12, 2009 with the filing of this response.

In discussing instances where a double patenting issue may arise, the M.P.E.P. indicates that “a double patenting issue may arise between **two or more pending applications, or between one or more pending applications and a patent.**” M.P.E.P. § 804(I) (emphasis added). Thus, double patenting rejections are only proper based on pending applications and patents.

This statement aligns with the public policy rationale where “[t]he doctrine of double patenting seeks to prevent the unjustified extension of patent exclusivity beyond the term of a patent.” M.P.E.P. § 804. As the '575 Application is abandoned, and thus will not issue as a patent, there is no concern regarding “extension of patent exclusivity beyond the term of a patent” over the claims of the instant application and any claims of the '575 Application. *Id.*

Thus, any double patenting rejections over the claims of the '575 Application are improper, as the '575 Application is not a **pending** application.

Therefore, for at least these reasons, Applicant respectfully requests the Examiner reconsider and withdraw the provisional obviousness-type double patenting rejection of claims 1-21.

**4. Conclusion**

In view of the foregoing, Applicant submits that all the claims are allowable, and thus Applicant respectfully requests allowance of the application. Should the Examiner wish to discuss this case, the Examiner is invited to call the undersigned at (312) 913-3338.

Respectfully submitted,

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